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August 8, 1994

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AUG - 8 1994

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: **Pagers Plus**
PR Docket No. 93-35
Motion for Declaratory Ruling

Dear Mr. Caton:

Transmitted herewith on behalf of Pagers Plus and pursuant to Section 5(d) of the Administrative Procedures Act and Section 1.2 of the Commission's Rules, are an original and four (4) copies of its Motion for Declaratory Ruling.

Please direct any questions or correspondence concerning this matter to our offices.

Sincerely yours,

Louise Cybulski
Louise Cybulski
Counsel for
Pagers Plus

Enclosures

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AUG - 8 1994

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Matter of) PR Docket No. 93-35
)
Amendment of the Commission's)
Rules to Provide Channel)
Exclusivity to Qualified Private)
Paging Systems at 929-930 MHz)

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TO: Chief, Private Radio Bureau

AUG - 8 1994

MOTION FOR DECLARATORY RULING

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Pagers Plus, the licensee of private carrier paging facilities licensed under Part 90 of the Commission's Rules, by counsel and pursuant to Section 5(d) of the Administrative Procedure Act and Section 1.2 of the Commission's Rules, hereby requests that the Commission issue a declaratory ruling to remove a point of uncertainty with respect to the above-captioned proceeding.

In support hereof, the following is respectfully shown:

1. In the Report & Order, 8 FCC Rcd 8318 (1993), the Commission amended its private carrier paging (PCP) rules to provide that qualified PCP systems could obtain channel exclusivity on a local, regional or national level. The declaratory ruling requested herein pertains to the method by which a PCP system may qualify for local exclusivity, specifically in one of the three top markets identified in the Report & Order. If its qualifications are properly demonstrated, the PCP system would enjoy exclusive use of its channel within its local market, except for any shared use of the channel with "grandfathered" incumbent co-channel licensees

in the market. Id. at 8329, ¶ 31. A grandfathered licensee which does not itself qualify for exclusivity may continue to operate its existing system, but is prevented from expanding its system in an area where a co-channel licensee has qualified for exclusivity. Id. at 8330, n.66.

2. One of the criterion an applicant for local exclusivity must meet is to propose the requisite number of contiguous transmitters depending on the size of the market. Each transmitter must be within 25 miles of another transmitter in the system. Report & Order, 8 FCC Rcd at 8321, ¶ 9. The applicant may count its existing sites toward the minimum required number of sites, and must propose to add a sufficient number of separate sites to reach the minimum number required. In most markets, an applicant must have existing or specify at least six contiguous transmitters to qualify for local exclusivity. Id. However, in the top three metropolitan markets of New York, Chicago and Los Angeles, an applicant must propose a minimum of 18 separate transmitter sites to qualify for local exclusivity. Id.

3. Regardless of whether an applicant is proposing local exclusivity in one of the top three markets or in one of the other markets, the question arises as to whether the transmitters must be located within certain defined boundaries of the market. In its Report & Order, at 8321, n.14, the Commission stated as follows:

For purposes of this rule making, a "market" is defined as the geographic area specified in

Section 90.741 of our rules, which consists of a 37.3 mile (60 kilometer) radius around designated coordinates in each city. Thus, an applicant or licensee who seeks exclusivity within part or all of this area in any of the top three markets must construct a system of at least 18 transmitters.

Although an inference can be drawn from this language that the 18 transmitters all must be located within the 37.3-mile radius of the particular city's coordinates, neither the Commission's Report and Order, nor the underlying Notice of Proposed Rule Making (PR Docket No. 93-35), 8 FCC Rcd 2227 (1993), specifically states that location within the 37.3-mile radius is required.

4. Undersigned counsel has been told informally by two members of the Private Radio Bureau staff that, although the Report & Order is not specific on this point and, to their knowledge, the Commission has not yet been requested to clarify the matter, it would be their opinion that a licensee should be required to locate all 18 transmitters within the 37.3-mile radius from the designated city coordinates. Pagers Plus respectfully submits that this interpretation of ¶ 9 and n.14 of the Report & Order would be logical to prevent a system from obtaining local exclusivity over a geographic area larger than the designated metropolitan market area. Further, Section 90.495 of the Commission's Rules implementing the requirements for channel exclusivity states at subsection (a)(1)(i) as follows:

A local system must consist of at least six contiguous transmitters, except in the New York,

Los Angeles and Chicago markets, as defined in § 90.741, where 18 contiguous transmitters are required.

47 CFR 90.495(a)(1)(i). As referenced, Section 90.741 of the Rules states as follows:

A base station is considered to be within one of the listed urban areas if it is within 60 kilometers (37.3 miles) of the specified coordinates.

47 CFR 90.741. The coordinates specified in Section 90.741 for the top three markets are 40°45'06"N, 73°59'39"W for New York; 34°03'15"N, 118°14'28"W for Los Angeles; and 41°52'28"N, 87°38'22"W for Chicago.

5. However, it is apparent that the frequency coordination staff at the National Association of Business and Educational Radio (NABER) is of the belief that an applicant for local exclusivity in one of the top three markets is not required to locate its 18 transmitters within the 37.3-mile radius. So long as each of the transmitters is within 25 miles of one other transmitter in the system, the 18 transmitters effectively could be located anywhere in the outlying areas surrounding the designated market area. As a leading frequency coordination service relied upon by applicants for private radio service, NABER recommends to the Commission whether a particular applicant qualifies for local exclusivity when forwarding that application to the Commission for processing. It is undersigned counsel's understanding from the Private Radio Bureau that the Commission staff will rely on NABER's recommendation and usually will not verify each application to


determine whether the applicant does indeed qualify for exclusivity under the Commission's Rules.

6. Pagers Plus respectfully requests that the Commission clarify any requirement that an applicant proposing local exclusivity in one of the top three markets must locate its 18 transmitters within the 37.3-mile radius from the designated city coordinates. This clarification would serve the public interest by avoiding the grant of local exclusivity to an applicant which does not propose to construct and operate the required number of transmitters within the designated market area.

Respectfully submitted,

PAGERS PLUS

By


Louise Cybulski
Its Attorney

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August 8, 1994

CERTIFICATE OF SERVICES

I, Susan A. Burk, a secretary with the law firm of Pepper & Corazzini, L.L.P., do hereby certify that a true and correct copy of the foregoing "Motion for Declaratory Ruling" was served by U.S. mail, first-class, prepaid-postage on this 8th day of August, 1994, on the following individuals:

- * Ralph A. Haller, Chief
Private Radio Bureau
Federal Communications Commission
2025 M Street, NW., ROOM 5002
Washington, DC 20554
- * David Furth, Acting Chief
Rules Branch, Private Radio Bureau
Federal Communications Commission
2025 M Street, NW, ROOM 5202
Washington, DC 20554

Terry L. Fishel, Chief
Michael J. Regiec, Deputy Chief
Land Mobile Branch, Private Radio Bureau
Federal Communications Commission
1270 Fairfield Road
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Susan A. Burk

* -- VIA HAND DELIVERY